



DATE ISSUED: MAY 16 1989  
CASE NO. 87-INA-556

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFI-  
CATION UNDER THE IMMIGRATION AND  
NATIONALITY ACT:

AMERICAN COPPER AND NICKEL CO., INC.,  
Employer,

on behalf of

RODERICK MACINNES,  
Alien

Daniel F. Boyle, Esq.  
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, Guill, Tureck, and  
Williams, Administrative Law Judges

JAMES L. GUILL  
Administrative Law Judge

DECISION AND ORDER

The above-named employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of labor certification application. This application was submitted by the employer on behalf of the above-named alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work and (2) employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the

requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under the prevailing working conditions through the public employment service and by other reasonable means in order to test U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (AF herein), and any written arguments of the parties. 20 C.F.R. §656.27(c) (1988).

### Statement of the Case

Employer, American Copper and Nickel Co., Inc. is an American subsidiary of INCO, a Canadian Corporation, engaged in the business of minerals exploration (AF-104). At the time of application, Employer had operations in Michigan, Minnesota, Wisconsin, North Carolina, and South Carolina (AF-48).

On September 22, 1986, Employer filed an application for alien labor certification on behalf of the Alien, Roderick MacInnes, for a position as a Senior Geophysical Operations Manager (AF-104). At Item #13 of the ETA 750A, Employer listed the duties for the job as follows:

Administers all crews performing ground geophysical surveys in the field. Is in charge of locating and carrying out geophysical surveys over anomalous areas following a prescribed pattern. In charge of establishing base camp sufficient to accommodate crew, ensuring the supplies and equipment in camp are adequate, training new men in work procedures and ensuring welfare and safety of crew. Coordinates program following assigned priorities and supervises operations of geophysical personnel. Compiles data furnished by Party Leader, reviews progress of program, and recommends changes in program and/or personnel.

(AF-104). At Item #14 in the ETA 750A, Employer stated that the minimum education, training, and experience required was eight years of Grade School, four years of High School, and five years in the job offered (AF-104). At Item #15 of the ETA 750A, Employer listed as Other Special Requirements that applicants be proficient in the use of "Inco Vertical Looped M System, Chrono Vertical Looped Systems, and Proton Magnetometer" (AF-104).<sup>1</sup>

In the Notice of Finding (N.O.F.) dated February 9, 1987, the C.O. denied the application for labor certification, inter alia, on the basis of §656.21(b)(2) finding that the proficiency requirement listed at Item #15 was unduly restrictive as this requirement is not normally required

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<sup>1</sup> Although the labor certification application lists the special requirement as proficiency in the use of the Inco Vertical M system, it appears that they are referring to an EM or AEM system. The workings of this type of system is discussed more fully later in this Decision and Order.

for similar positions in the United States (AF-95).<sup>2</sup> Employer was required either to delete the unduly restrictive requirement or to justify that it arises from business necessity.

In its rebuttal dated April 14, 1987, Employer argued that there was a business necessity for proficiency with the equipment listed at Item #15 (AF-33). In support of its argument Employer stated that to hire someone without such proficiency would be disruptive and inefficient to their U.S. operations (AF-48), that training could only be obtained in Canada because the INCO EM equipment was invented and developed by the parent company (INCO) in Canada (AF-33 and 48), and that a lengthy period of practical training in Canada would be necessary to get a person to the level of proficiency required (AF 48).

In the Final Determination, the C.O. rejected Employer's rebuttal arguments and denied labor certification (AF-3). The C.O. decided that Employer had not satisfactorily rebutted the finding or cured the deficiency.

Employer filed its request for review on June 11, 1987, and a supporting brief on September 3, 1987.

#### Discussion and Conclusion

The issue presented is whether the Employer has rebutted the C.O.'s finding that proficiency in the use of the specific equipment listed at Item #15 of the ETA 750A is unduly restrictive by establishing that it arises from a business necessity.

To establish business necessity under §656.21(b)(2)(i), Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. In re Information Industries, Inc., 88-INA-82 (February 9, 1989) (en banc). In the context of this case, Employer must demonstrate that the requirement listed at Item #15 of the ETA 750A, i.e., proficiency in the use of Inco Vertical M Looped Systems, Chrono Vertical Looped Systems, and Proton Magnetometers, bears a reasonable relationship to the job position of Senior Geophysical Operations Manager (the occupation) in the context of minerals exploration (the business) and is essential to perform, in a reasonable manner, the job duties described.

Employer has demonstrated that proficiency in the use of Inco Vertical M Looped Systems, Chrono Vertical Looped Systems, and Proton Magnetometer bears a reasonable

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<sup>2</sup> Section 656.21(b)(2)(i)(A) is as follows:

- (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive requirements:
  - (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
    - (A) Shall be those normally required for the job in the United States; . . .

relationship to the occupation in the context of its business. According to the record in this case, the current method used for minerals exploration is the airborne electromagnetic method also known as AEM. An AEM system creates alternating electromagnetic fields which can be continuously measured. Exploration is accomplished by comparing the resultant fields at a point located at a distance from the source of the fields while the fields are moved over a set path at a substantially constant speed and altitude above the terrain (AF-50). The equipment with which Employer requires proficiency is equipment by which minerals exploration is accomplished. In the vernacular, this equipment comprises a set of tools of the trade for a Senior Geophysical Operations Manager (the occupation) in the context of minerals exploration (Employer's business). Therefore, this requirement bears a reasonable relationship to the occupation in the context of Employer's business.

According to the record, however, this equipment does not comprise the only AEM system with which a Senior Geophysical Operations Manager may accomplish minerals exploration, and Employer has not proved that experience operating one of the other systems does not prepare an applicant to operate an INCO system. Therefore, Employer has not met its burden to demonstrate that proficiency in the use of the specific equipment listed at Item #15 of the ETA 750A is essential to perform, in a reasonable manner, the duties it described.<sup>3</sup> In support of its argument Employer submitted two publications concerning AEM systems which, Employer asserted, would explain how the equipment with which it requires proficiency is "quite different from other systems widely used in the industry." (AF 33). Employer's argument fails, however, because the publications to which it refers do not demonstrate that its listed equipment is "quite different" from other systems. The first publication (AF 50) includes no information from which to determine where, when, or by whom it was published, and therefore, cannot be identified. It is obviously part of a larger publication because it begins at page 282. Its only complete section is entitled "(a) Inco AEM System. (Prepared by the Staff of The International Nickel Co. of Canada, Ltd.)."<sup>4</sup> Although this document describes in great technical detail the workings of INCO's particular AEM system, it does not differentiate, in any way, between INCO's system and others used in the industry.

The second publication (AF 55) is a scientific paper written by N.R. Paterson<sup>5</sup> and published in The Canadian Mining and Metallurgical (CIM) Bulletin for January 1971. In his

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<sup>3</sup> Under the Act the burden of proof is on the applicant to show eligibility for a visa for entry into the U.S. 8 U.S.C. §1361. By virtue of the regulatory scheme in alien labor certification matters which makes the employer the applicant, this burden devolves onto the employer. To meet its burden, Employer must demonstrate that it is in compliance with the regulations. See 20 C.F.R. §656.2(b).

<sup>4</sup> It is worth noting here that this publication was prepared by Employer's parent company which invented the AEM system at issue. (AF 33).

<sup>5</sup> Mr. Patterson's credentials, as listed in the paper, are such that his status as an expert would be hard to question. Among other credentials, he received his Ph.D. in geophysics from the University of Toronto in 1955 and is the author of more than thirty scientific papers.

paper, Mr. Paterson compares some 17 AEM systems which were in use at that time. The comparison, however, is not between the individual systems; rather each system is characterized as one of four types of AEM systems,<sup>6</sup> and it is the types which are compared. Mr. Patterson painstakingly defines six categories<sup>7</sup> in which to compare the overall performance of the various types of system. What follows is a highly technical discussion of how each type of system performs in each category. Significantly, what this paper does not compare, or even address for that matter, is the relative difficulty with which each of the systems can be operated.

In sum, Employer's argument, that the equipment with which it requires proficiency is different from other systems used in the industry, is not substantiated by the publications submitted. The first is merely a technical explanation of the workings of INCO's system and does not differentiate it from other systems used in the industry, and the second compares only the performance characteristics of the general types of AEM systems which were in use 18 years ago. Neither publication speaks to the crux of what Employer must show: that its system is so different from the others that experience operating one of the other systems does not prepare an applicant to operate the INCO system. In the absence of such a showing we cannot find that proficiency with the specific equipment listed at Item #15 of the ETA 750A is essential to perform, in a reasonable manner, the job duties described. Therefore, Employer has not demonstrated that its requirement arises from a business necessity.

#### ORDER

Accordingly, the Final Determination of the Certifying Officer denying certification is hereby AFFIRMED.

At Washington, DC

Entered: May 16, 1989

James L. Guill  
Administrative Law Judge

JLG/BDC

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<sup>6</sup> The types are: 1) rigid-coupled, in phase/quadrature systems; 2) towed-bird, single component systems; 3) differential systems; and 4) passive systems.

<sup>7</sup> The six categories are penetration, sensitivity, discrimination, resolution, conductivity-width aperture, and lateral coverage.